United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1030

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77 - 1030

B P/S

UNITED STATES OF AMERICA,

APPELLEE,

- v. -

WAYNE BROWN,

APPELLANT.

On Appeal from The United States District Court

For The District of Connecticut

Brief for the Appellant

Daniel H. Kennedy, Jr.
Special Federal Public Defender
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West Hartford, Connecticut 06107

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UNITED STATES OF AMERICA,

APPELLEE,

- V. -

WAYNE BROWN,

APPELLANT.

BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

On September 17, 1976, a Federal Grand Jury sitting in Hartford, Connecticut returned a one-count indictment charging Wayne Brown and Arlo Lewis with the robbery of the United Bank and Trust Company, Windsor, Connecticut on July 10, 1976, in violation of Title 18, United States Code, Section 2113 (a).

On September 24, 1976, Wayne Brown and Arlo Lewis entered pleas of not guilty before the Honorable M. Joseph Blumenfeld, Judge, United States District Court for the District of Connecticut. On November 16, 1976, the trial

of defendant Wayne Brown commenced before the Honorable M. Joseph Blumenfeld and a jury of twelve. On November 17, 1976, the trial continued and the appellant Wayne Brown's motion to sever his trial from the trial of co-defendant Arlo Lewis was granted. Trial by jury continued on November 18, 1976, and the court denied Wayne Brown's Motion for Judgment of Acquittal. The jury retired on November 18, 1976, to begin deliberations. On November 19, 1976, jury deliberations resumed and at 11:03 a.m. the jury reported a verdict of guilty as charged.

On December 9, 1976, co-defendant Arlo Lewis entered a plea of guilty to a one-count information charging Lewis with carrying away monies from a federally insured institution in violation of Title 18, United States Code, Section 2113 (b).

On January 3, 1977, Judge Blumenthal sentenced appellant Wayne Brown to eight years imprisonment. On January 3, 1977, Judge Blumenthal sentenced Arlo Lewis to three years imprisonment for violation of Title 18, United States Code, Section 2113 (b) and dismissed the indictment charging violation of Title 18, United States Code, Section 2113 (a) upon motion of the government.

STATUTE INVOLVED

TITLE 18, United States Code, Section 2113 (a):

§ 2113. Bank robbery and incidental crimes

(a) whoever, by force and violence,

or by intimidation, takes or attempts to take, from

the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny——

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

QUESTIONS PRESENTED

Whether it was reversible error to admit into evidence testimony from a government witness regarding a .38 caliber handgun, cartridges and $503.00 found in the defendant's possession two days after a bank robbery?

Whether it was reversible error to admit into evidence a .38 caliber handgun found on the defendant's possession two days after a bank robbery?

STATEMENT OF FACTS

On July 10, 1976, at approximately 10:58 a.m., the United Bank and Trust Company, Windsor Branch Office, located at 494 Windsor Avenue, Windsor, Connecticut was robbed of $2,147.00. One of the robbers carried a small handgun during the robbery. The gun wielding robber carried a briefcase and wore a blue denim hat and sunglasses. The second robber carried a black briefcase but did not show a weapon during the robbery. Both robbers were young black males, slight in stature. The bank surveillance film was far from clear, and photographs developed from the surveillance films showed "blurry" images of the gun wielding robber. (App. pp. 81, 212, 223) The film did not record any pictures of the second robber.

A 1970 green Chevrolet Camaro, alleged to be the getaway car was found approximately four-tenths of a mile from the bank parked in a driveway of the Stanadyne Company on July 12, 1976. The keys were not in the ignition at the time the car was found. Several articles were found in the automobile, including a blue denim hat and a pair of sunglasses. (App. pp. 152-169)

On July 12, 1976, the appellant Wayne Brown was stopped by a police officer employed by the Port Authority of New York and New Jersey. The appellant was carrying a black briefcase containing one .38 caliber revolver and four cartridges. The appellant had $503.00 and change on his person and had purchased an airlines ticket from Eastern Airlines. (App. pp. 338-344)

On July 14, 1976, two thirteen year old boys playing in the woods behind 98 Midian Avenue, Windsor, Connecticut found several items and informed one of the boy's mother who in turn alerted the Windsor Police.[1] (App. p. 174) Officers Gasparino and Overstrom of the Windsor Police Department responded to the telephone call and were given certain items by Mrs. J.A. Dallaire. The items recovered consist of a black briefcase, a Samsonite briefcase, a purplish flowered shirt, a pair of pants bluish-grey in color, a pair of pants brown in color, a bank book, and a United Bank & Trust Company money wrapper. (App. pp. 174-178) Additionally, the officers searched the wooded area and found another United Bank and Trust Company money wrapper, and a whitish colored shirt. (App. p. 180)

The trial of appellant Wayne Brown commenced on November 16,1976. All three employees of the United Bank and Trust Company branch office were called by the government as witnesses. Mae Johnson, a bank teller,

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[1]The Dallaire property located at 98 Midian Avenue is contiguous to the Stanadyne Company property. (App. p. 175)

was unable to make an in-court identification as she had been unable to make a pre-trial photographic identification. [2](App. pp. 37,44) Mrs. Johnson was unable to identify Government Exhibit No. 21 for Identification as the gun used during the robbery and in fact believed the robbery gun had a longer barrel than the exhibit. [3](App. pp. 35, 45)

The bank manager, Joseph Lupacchino, Jr., who "really tried to concentrate" on identification of the robbers could not make a pre-trial or in-court identification of the appellant. (App. pp. 65-88) Mr. Lupacchino could not identify the handgun but thought it looked like the gun wielded by the gunman. (App. pp. 69-70) Linda DePascale the third bank employee could not identify the appellant either in a pre-trial photographic spread or in court and she could not identify Government Exhibit No. 21 for Identification as the weapon used in the robbery. (App. pp. 109,112)

Testimony was elicited from several bank customers, none of whom identified either the appellant or the handgun. Leroy Arnold could not identify Mr. Brown. (App. p. 123) Lawrence Novella could identify neither Mr. Brown nor the handgun. (App. pp. 129, 134, 136) Rita Henry when asked to identify the appellant, could not do so. (App. pp. 146, 148)

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[2]Detective Everett Overstrom of the Windsor Police Department testified that two photographic spreads were shown to bank employees, customers and witnesses. He further testified that appellant Brown's photograph was included in one of the two photographic spreads. (App. pp. 359-361)

[3]The government marked this exhibit along with other government exhibits as government exhibits for identification prior to commencement of the trial. (See discussion App. pp. 17-19)

It was stipulated between the parties that the 1970 Chevrolet Camaro found in the driveway at Stanadyne was registered to the appellant, Wayne Brown and that the automobile dealer's records indicated the car was purchased by Wayne Brown on June 15, 1976. (App. p. 150)

Several witnesses who were not employees or customers of United Bank and Trust Company were called by both the government and the defense. Cecil Hawkes, the appellant's apartment manager could not identify the appellant from a photograph developed from the bank surveillance film. (App. p. 212) Max Cohn, an employee of a store located near the bank observed two men he believed may have been the robbers but could not identify the appellant as one of the men he observed. (App. pp. 364,367) Frances Sullivan, another observer could not identify the appellant. (App. p. 395) Joseph Kobylarz, the appellant's supervisor at the Royal Typewriter Company who spent every working day with the appellant not only did not identify the appellant from the bank surveillance photographs but added "[I]t does not look anything like him...."(App. p.374)

The government elicited testimony from Fernanda Pereira, the proprietress of a cleaning establishment frequented by the appellant. Mrs. Pereira testified that the number on a laundry tag (found stapled to the inside of a pair of pants disgarded in the woods behind 98 Midian Avenue) matched the number on a laundry slip kept by her store on which the name "Brown" appeared. She further testified that she has at least one other customer with

the last name "Brown" and possibly may have more. (App. pp. 191-199)

A co-worker of the appellant at Royal Typewriter, Willie Wright, was called as a government witness. While being cross-examined Mr. Wright testified that during the morning of robbery the appellant met Wright in front of Wright's residence and both men after deciding to travel to New York City walked to a bus station in Hartford, a ten to fifteen minute walk from Wright's apartment. (App. pp. 236-240) Although, Wright was confused with reference to the time frames involved he added that both men left Hartford for New York City sometime between eleven and one o'clock, after waiting fifteen to thirty minutes for a bus. He believed the appellant acted normally and remembered that Wayne Brown did not carry luggage or a briefcase with him. Further, he testified that he purchased the bus tickets and Brown did not reimburse him for the cost of his ticket. (App. pp. 249-253)

The government's primary witness, Arlo Lewis, was the indicted co-defendant in this matter. Lewis was 24 years old, had a seventh grade education, was a convicted felon with a substantial criminal record and was an admitted heroin addict. (App. pp. 278-281) Lewis identified the appellant as the individual who robbed the United Bank and Trust Company, Windsor Office, with him on the morning of July 10, 1976. (App. p. 283) It should be noted that his testimony

substantially differed from statements he had previously given to the FBI. (App. pp. 309-310) Lewis testified under a grant of immunity and was told he would be allowed to plea to a lesser charge. (App. pp. 321)

Officer Clifford Barry a police officer employed by the Port Authority of New York and New Jersey was called as a witness and testified that on July 12, 1976, he had occasion to search a briefcase carried by the appellant in the Eastern Airlines Terminal at LaGuardia Airport. (App. pp. 337-338) Officer Barry testified that he found a .38 caliber revolver and four cartridges in the briefcase and fice hundred and three dollars and change on the appellant. (App. pp. 339-342) The defense argued for exclusion of officer Barry's testimony in the absence of the jury. (App. pp. 329-336) Objection was made by the defense to the officer's testimony and to the admission of the handgun as a full exhibit. (App. pp. 338, 341, 342) A limiting instruction was given by the trial judge immediately after the weapon was admitted. (App. pp. 343-344)

Special Agent, David W. Miller an investigating agent for the FBI, called by the defense, testified that no latent fingerprints were developed in the case. (App. p. 356) He further testified that Mr. Brown had consented to having his fingerprints taken by Agent Miller in November of 1976. (App. p. 356)

ARGUMENT

I.

IT WAS REVERSIBLE ERROR TO ADMIT EVIDENCE AGAINST THE APPELLANT WHERE SUCH EVIDENCE WAS NOT RELEVANT OR WHERE THE PROBATIVE VALUE OF THE EVIDENCE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE TO THE APPELLANT.

A. RELEVANCY

A threshold inquiry, essential in any balancing of probative value of evidence against its prejudicial impact is whether such evidence is relevant. Relevant evidence is defined in the Federal Rules as "[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

The standard of probability established under the rule is an extremely generous standard. Under the test of Rule 401 we would concede that testimony from Officer Barry regarding the handgun and cartridges was relevant. Likewise, the gun itself was relevant evidence. However, the Officer's testimony with reference to the sum of money found on the appellant's person stands on a different footing.

Sudden possession of considerable amounts of money by an accused has been recognized as relevant to a charge such as in the instant case. United States v. Ravich, 421 F. 2d 1196, 1204 (1970). Clifford Barry's testimony on this point was as follows:

Q. Do you know how much money he had on him on July 12th?

A. Yes, sir.

Q. Was that money in cash?

A. This is correct.

Q. How much money did he have on him?

A. $503. and change. (App. pp. 341-342)

Q. Now, did you at any time check, take a list of the serial numbers on the $500. he had with him?

A. Yes, I did.

Q. Do you happen to know whether or not those serial numbers match the serial numbers of money taken in this bank robbery?

A. None of the numbers match.

Q. So that the money you found on Wayne Brown was not any of the funds taken from this bank robbery, as far as you know?

A. As far as I know, that's correct. (App. p. 346)

Other testimony germane to this issue was elicited from Cecil Hawkes, who testified that the appellant had asked to pay his rent late sometime in July of 1976. (App. p. 207) However, Mr. Hawkes, also testified that he had many conversations with Mr. Brown concerning the rent, implying that late payment of rent was not a problem confining itself to July of 1976. (App. p. 203) The only other testimony elicited on this subject was a statement from

Willie Wright that Wayne Brown owed some people money. (App. p. 232) Additionally, it should be noted that Wayne Brown was employed at Royal Typewriter and was so employed at the time the robbery was committed. (App. p. 371)

It is clear that the money found on Mr. Brown does not correspond to the money taken in the robbery. This being true, the only possible claim of relevancy can be one of sudden possession. However, it is incumbent on the government to prove that before the time of taking the possessor was without money and immediately thereafter he possessed a great deal of money. I. J. Wigmore, Evidence § 154, at 601 (3d ed. 1940). Certainly Brown was not in possession of a large amount of money as in United States v. Fisher, 455 F. 2d 1101, 1103 (2d Cir. 1972) and United States v. Yates, 362 F. 2d 578, 579 (10th Cir. 1966). Nor had Brown spent a large sum of money shortly after the robbery as in Lyda v. United States, 321 F. 2d 788, 790 (9th Cir. 1963). As Wigmore so succinctly stated:

> The mere possession of a quantity of money is in itself no indication that the possessor was the taker of money charged as taken, because in general all money of the same denomination and material is alike and the hypothesis that money found is the same as the money taken is too forced and extraordinary to be

receivable, I. J. Wigmore, supra, § 154, 25 601

It is respectfully suggested that testimony concerning the appellant's possession of $503. and change on July 12, 1976, was not relevant to any issue in the trial.

B. FEDERAL RULE OF EVIDENCE 403 - IN GENERAL

Federal Rule of Evidence 403 states:

> Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The rule is not compelling but rather is discretionary in its application. The rule presumes that the evidence in question is relevant. In applying Rule 403 the trial judge must first decide if the rule applies to the contested evidence. If the rule applies the judge must make an estimate of the probative value and the prejudicial impact of the evidence and decide which outweighs the other. Additionally, the trial judge may have to decide what action to take if the evidence has run afoul of the rule. Dolan, Rule 403: The Prejudice Rule in Evidence, 49 So. Cal. L. Rev. 220,225 (1976).

"Unfair prejudice" is defined as "an undue tendency to suggest

decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Note to Fed. R. Evid. 403. It is evidence that "appeals to the juries sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action that may cause a jury to base its decision on something other than its established propositions in the case." Weinstein, Weinstein's Evidence § 403 [03] at pp. 15-17 (1975).

In making his decision, on whether to admit or exclude the contested evidence the trial judge becomes involved in a balancing process. He must balance the actual need for the evidence, keeping in mind the contested issues and the other evidence available, and the strength of the evidence in proving the issue against the danger that the jury will be prejudiced. United States v. Goodwin, 492 F. 2d 1141, 1150 (5th Cir. 1974).

C. PROBATIVE VALUE UNDER RULE 403

The only real issue during the trial of the instant matter was the identification of the appellant as one of the robbers who robbed the United Bank and Trust Company, Windsor Branch on July 10, 1976.

Two inferences are necessary to establish identity based upon the appellant's possession of the .38 caliber revolver in New York City on July 12, 1976. United States v. Robinson, 544 F. 2d 611, 616

(2d Cir. 1976).

The first inference can best be stated "[B]ecause the defendant possessed the gun when found, later, therefore he probably possessed it at the time." II J. Wigmore, supra § 410 at 384. Testimony elicited on this point from Officer Barry indicated that Brown bought the gun in New York two years prior to July 12, 1976. However, Barry only vaguely remembered the conversation. (App. p. 346) Testimony from the appellant's girlfriend indicated that Wayne Brown never had a gun when she was present and that they dated for approximately five months in 1976. (App. pp. 263, 269) The other facts in the instant matter are much unlike the facts in Ravich, supra. Here, the amount of cash on the appellant was small and unidentified, no one could identify the appellant from bank surveillance photographs, there was no in-court identification except from the alleged accomplice, only a single gun was found in appellant's possession, no witness could identify the caliber of the gun, no witness could identify the gun. Even in the light of Officer Barry's unsure testimony this inference is still open to doubt. "[S]ome circumstance operating in the interval may have been the source of the subsequent existence." II J. Wigmore, supra § 437 at 413; United States v. Robinson, supra, at 616.

If the jury found the first inference to be true, it would then have to find that a .38 caliber handgun was used in the robbery and that the

appellant's gun was the gun used in the robbery. United States v. Robinson, supra, at 617. Finding that a .38 caliber handgun was actually used in the robbery would have been a difficult conclusion to reach since there was no direct evidence that a .38 was used nor was their evidence as in Robinson setting forth the guns the robbers had in their possession immediately prior to the robbery. Finding that the gun found on the appellant in New York City was the gun used in the robbery was also a difficult and highly unlikely conclusion for the jury based on the testimony.[4]

The identity of the weapon in the instant matter differs substantially from those cases where the gun found was directly linked to the gun used in the crime, as in United States v. Jackson, 509 F. 2d 499, 508 (D.C. Cir. 1974); United States v. Burke, 506 F. 2d 1165, 1170 (9th Cir. 1974); United States v. Knight, 509 F. 2d 354 (D.C.Cir. 1974); United States v. Yates, supra at 579. In sum, the probative value of Officer Barry's testimony and of the gun itself is weak. Likewise, the probative value of his testimony regarding the sum of money

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[4]The evidence at trial indicated it was a "short black gun", that "it could have been a little longer" than the gun found in the appellant's possession, that it was "blue black metallic" with "a two inch barrel," that it was "between a .32 and a .38 caliber, that it had a "cylinder", and that it was "similiar" to the gun found in Brown's possession. In fact not one witness including the alleged accomplice could positively identify the gun. (App. pp. 35, 68, 69, 104, 304, 318)

found on the appellant must be viewed as slight since there was no direct evidence tying-in the money found with the money taken.

D. PREJUDICIAL EFFECT UNDER RULE 403

Special care must be taken by the trial judge in connection with admissibility under Rule 403. This is especially applicable when an accused is found in possession of a .38 caliber handgun in New York City. The presence of any of the testimony about the revolver indicates to the jury that appellant was a bad man engaged in other criminal conduct and was a man who might shoot anybody who attempted to frustrate his criminal purpose. Moody v. United States, 376 F. 2d 525, 532 (9th Cir. 1967).

The testimony and circumstances surrounding Officer Barry's confrontation with the appellant all too easily suggested involvement in other crime for which appellant could have been arrested.[5] The entire testimony of Officer Barry suggests a possible government attempt to obtain the so-called "bad man conviction."[6]

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[5]Although there was no direct testimony concerning an arrest, the government in it's request to charge misstated the evidence, requesting a charge which indicated that appellant had been arrested. (App. p. 17) The request was incorporated in the Court's charge but was corrected at the request of defense counsel. (App. pp. 419, 435)

[6]Note that the government also attempted to introduce a gun holster into evidence through Detective Overstrom. However, an objection on the ground that the introduction of the holster could inflame the jury was sustained. (App. pp. 348-351)

The jury readily can reason, that a man who commits a crime probably has a defect in his character thus such a man is more likely than not to have committed the act in question, Weinstein, supra, 105 [03] at p. 404-40. Where the government's offer of proof entails a risk that unrelated crimes will be brought to the juries attention the evidence should be excluded. See, United States v. Jackson, 405 F. Supp. 938, 944-945 (E.D.N.Y. 1975). Evidence of other criminal conduct should only be admitted where there is genuine need and relevancy. United States v. Goodwin, supra at 1150.

Wigmore points out two objections to introduction of the gun. The natural tendency to infer from the production of the gun the truth of all that is predicated of it. Secondly, he professes that the mere sight of a deadly weapon tends to associate the accused with the act. While the first objection can be overcome the second objection can never be entirely overcome even by the use of limiting instructions from the court. IV Wigmore, supra § 1157 at 254.

A limiting instruction similiar to the instruction given in Robinson was given in the instant matter.(App. pp. 343, 344) Without discussing the substance of the instruction the appellant takes the position that it was ineffective. See, Krulewitch v. United States, 336 U.S. 440, 453 (1949); United States v. Brown, 490 F. 2d 758, 765 (D.C. Cir. 1973); Note, The Limiting Instruction - Its Effectiveness and Effect, 51 Minn. L. Rev. 264, 288, 289 (1966); Broeder, The University of Chicago Jury Project, 38 Neb. L. Rev. 744, § 753 (1959).

In matters involving evidence of sudden acquisition of money, the probative value of admitting the testimony may be outweighed by the possibility of confusing and prejudicing the jury. Lyda v. United States, supra at 790. It is the claim of the appellant that the admission of testimony regarding the sum of money found on the appellant, in light of the facts of this case, was a prejudicial admission substantially outweighing any probative value the evidence may have had.

E. REVERSIBLE ERROR

Federal Rule of Evidence 103 (a) provides:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected....

The court in Government of Virgin Islands v. Tota, 529 F. 2d 278 (3rd Cir. 1976), quoting Kotteakos v. United States, 328 U.S. 750, 764-765 (1946), states:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected..

This case is not unlike, United States v. Robinson, supra, or Walker v.

United States, 490 F. 2d 683 (8th Cir. 1974), where the words "less than an airtight case" could characterize the evidence. The appellant especially points to the fact that eight witnesses were called who had an opportunity to observe the robbers and none could identify appellant. Appellant also especially points to the fact that the primary witness against him, Arlo Lewis, was a convicted felon with a substantial criminal record, who was addicted to heroin, who had been told he would be allowed to plea to a lesser charge and who testified in contradiction to statements he previously made to the FBI.

A review of the evidence developed at the trial indicates that the admission of the gun and of Officer Clifford Barry's testimony with regards to both the gun and the money was reversible.

CONCLUSION

For the foregoing reasons, the appellant submits that the Judgment of the District Court is unsound and should be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
APPELLEE	:	
	:	
VS.	:	DOCKET NO. 77-1030
	:	
WAYNE BROWN,	:	
	:	
APPELLANT	:	

CERTIFICATION OF SERVICE

In accordance with Rule 25 (d) F.R.A.P., the appellant, Wayne Brown hereby certifies that on the 23rd day of February, 1977, a copy of the appellant's brief and appendix was hand delivered to Albert S. Dabrowski, Esq., Assistant U.S.Attorney, 450 Main Street, Hartford, Connecticut and that on said date eight copies of said brief and appendix were mailed, postage prepaid to the United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, 10007.

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